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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. EUGENE AGUILAR, Defendant and Appellant.	H044120 (Santa Clara County Super. Ct. No. C1492588)

Following a jury trial, defendant Eugene Aguilar was found guilty of assault with a deadly weapon (knife) (Pen. Code, §§ 245, subd. (a)(1)).[1] The victim of the assault was A., one of defendant's cousins. The trial court found true two strike allegations under the Three Strikes law (§§ 667, subd. (b)-(i); 1170.12), the allegation of a prior serious felony conviction (§ 667, subd. (a)), and a prior prison term allegation (§ 667.5, subd. (b)).

The trial court denied defendant's *Romero* motion (see *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497). Defendant was sentenced to an indeterminate term of 25 years to life under the Three Strikes law consecutive to a five-year enhancement for the prior serious felony conviction (§ 667, subd. (a)). The court struck the punishment for the prior prison term pursuant to section 1385.

On appeal, defendant contends that the trial court erred by (1) overruling objections to hearsay statements, which were contained in the 911 call played for the jury

[1] All further statutory references are to the Penal Code unless otherwise specified. The jury found not true an allegation that in committing the charged offense, defendant personally inflicted great bodily injury upon the assault victim (§ 12022.7, subd. (a)).

and indicated that A. had been stabbed; and (2) excluding two of A.'s comments in his statement to the defense investigator, which were proffered to impeach A. at trial. Defendant claims that the exclusion of that proffered impeachment evidence violated his federal constitutional rights to confront adverse witnesses and to present a defense. He asserts that the cumulative prejudicial effect of the alleged errors requires reversal. Lastly, defendant maintains that this case must be remanded for resentencing to allow the trial court to have an opportunity to exercise its discretion to strike the serious felony prior conviction under section 1385, as recently amended.

We agree that the trial court should be afforded the opportunity to exercise its discretion under the newly amended section 1385 but otherwise find no reversible error. Accordingly, we reverse and remand the matter solely for resentencing.

I

Evidence

Defendant's father lived on Gomes Drive in San Jose. He lived with multiple family members, including his nephew, J.

In September of 2014, family members gathered at the home of defendant's father to watch the 49ers game. Defendant's father had a TV in his garage, and he opened his garage when family came over. There was beer at the party, and most people were drinking, including defendant's father. A. was there.

Defendant's father acknowledged that he had probably had more than 10 beers and possibly more than 20 beers that day. Defendant's father admitted that he was drunk that night and that he was an alcoholic.

Defendant's father, who worked the graveyard shift as a janitor, was getting ready for work that evening when he received a phone call from defendant's long-time girlfriend, who earlier had been at the house with defendant. Defendant's girlfriend said that defendant and she were "getting into it" and arguing, asked defendant's father to come and calm down defendant. She told him that they were "[d]own the street."

Defendant's father asked his nephew, A., who was standing next to him, to give him a ride.

They had driven about half a block down Gomes when defendant was spotted. A. turned right onto Mosswood Drive, which dead-ends on Gomes, pulled partway into a driveway, and stopped his car, and A. and defendant's father got out. Defendant's father had no weapon with him.

Defendant's father confronted defendant; they began pushing each other, yelling at each other, and scuffling. Defendant pushed his father, and his father fell to the sidewalk. Defendant's father got up and went at defendant again. Defendant pushed his father again, and his father fell to the sidewalk for a second time. While defendant and his father were still yelling, defendant's father saw defendant throw something to the ground.

At some point, defendant's father heard someone yell out that A. had been stabbed. Defendant's father began chasing defendant "down the street." Defendant's father was angry and upset with defendant. When defendant's father caught up with defendant, he punched defendant in the mouth. The police showed up. At trial, defendant's father acknowledged that defendant and he were both "out of control" that night.

At approximately 7:26 p.m. on September 7, 2014, Jonathan Levos and Ryan Welch, both San Jose police officers on patrol, separately responded to a 911 call, which had been made from an address on Gomes Drive.

On the way to that address, Officer Levos saw two men struggling with each other. The older of the two was restraining the other and waving down the officer. Officer Levos parked parallel to the curb on Morrill, near the corner of Gomes Drive, and got out of his car.

Officer Welch also saw one male holding another male. Someone waved down Officer Welch. Officer Welch, who arrived about the same time as Officer Levos, also

parked along the curb on Morrill Avenue. Officer Welch saw two or three other people with the two men.

At trial, Officer Levos identified the older man as defendant's father. Officers Levos and Welch both identified defendant as the man who was being restrained.

As Officer Levos approached the two men, he heard defendant's father yelling at defendant something to the effect of, "Why did you stab him? Why? Why did you do that to him?" Defendant's father appeared to be very angry at defendant and defendant was crying. Defendant answered, "I didn't mean to stab him. I was only throwing the knife. He's my cousin. I love him."

Defendant exhibited signs or symptoms of being under the influence of alcohol. Defendant had red, bloodshot eyes, and the odor of an alcoholic beverage emanated from him. Defendant's father looked disheveled, as if he had been in a scuffle; he was sweating and emotional.

Officer Levos separated the men, and he pat-searched defendant and found no weapons. Defendant was placed in handcuffs. When Officer Welch searched defendant, he found a knife sheath attached to defendant's belt but no weapons. Officer Welch removed the sheath from defendant's belt.

Other officers arrived at the scene. Officer Welch was the primary investigating officer of the 911 call. Officer Welch assigned the responsibility of taking custody of defendant to Officer Levos, and he assigned the responsibility of collecting evidence to Officer Kahn. Officer Welch turned the knife sheath over to Officer Kahn for booking into evidence.

Officer Levos secured defendant at the scene by putting him in the back of his patrol car. The officer sat in his car with defendant, who was crying. A different officer later took custody of defendant.

Officer Welch made contact with defendant's father and took his statement. An audio recording of their conversation was played for the jury.

Officer Welch then took photographs of defendant and his father at the scene. Defendant had blood on his hands and face; his mouth was swollen. Defendant's father had blood on his hands. Officer Welch also observed drops of blood and a jersey on the sidewalk on Morrill Avenue and took photographs. The jersey was booked into evidence.

On September 7, 2014, Brian Asuelo, a San Jose police officer, drove to an address on Gomes Drive in response to a 911 call. When Officer Asuelo arrived, he saw four or five "people in a driveway, blood, and [a] male sitting in a chair." The male, A., had blood dripping out of his arm and puddling on the ground, despite the pressure being applied to the wound by family members. It looked to Officer Asuelo as if A.'s arm had been "split open," and he could see "fatty tissue and the muscle fibers." An ambulance arrived shortly after the officer's arrival. Officer Asuelo briefly talked to family members. When Officer Asuelo asked A. who had injured him, A. said "people [had been] fighting down the street," but A. did not describe who had cut him. Officer Asuelo described A.'s demeanor as evasive.

Officer Welch learned from another officer that the victim had a laceration on his arm and that an ambulance and paramedics had arrived on the scene.

Todd Wellman, a San Jose police officer, was on patrol the night of September 7, 2014. At approximately 7:30 p.m., Officer Wellman was dispatched to a house on Gomes Drive. Officer Wellman was tasked with looking for "any kind of blood trail." He found blood on the sidewalk as he walked eastbound on Gomes toward Mosswood Drive. He saw a car that was "irregularly" parked at an angle, halfway into a driveway on Mosswood Drive. He discovered a knife in a dry patch of grass next to the sidewalk on Mosswood Drive, near the corner of Gomes. There appeared to be a small amount of blood on the knife, but he did not pick up or closely examine the knife.

The knife found by Officer Wellman during the police investigation was collected and later admitted into evidence at trial. At trial, Officer Wellman put the knife into the sheath and testified that "[i]t appear[ed] to click in, lock in."

At trial A. attempted to "plead the Fifth" when called as a witness. He confirmed that he was in court because he had received a subpoena and did not want to be there. A. testified that defendant was his cousin, he had known defendant all his life, and he was 22 years old. A. also knew defendant's father—his uncle—very well.

A. confirmed that he had been cut on his upper left arm, and later the same day he had gone to the hospital and received stitches for the injury. At the trial A. claimed that his memory was blank and he did not know how the cut happened.

A. acknowledged, however, that he had not gotten into a physical fight at the party. A. claimed not to remember defendant's father (his uncle) asking him for a ride, driving him down the street, or parking on Mosswood. A. said that he never saw defendant with a knife. However, A. admitted that the person stitching his arm at the hospital had asked some questions and that he had answered them as best as he could. A. claimed not to remember saying that he had been trying to break up a fight and had been stabbed by "an unknown person." A. acknowledged that he loved defendant.

A 911 call was played for the jury. A. testified that he heard his voice on the audio recording describing what had happened.

A. had previously testified at the preliminary hearing as follows. In September of 2014, family members got together to watch a 49ers game. His uncle asked him to take him down the street. A. drove him a very short distance and parked. After that, A. was cut on his arm.

J., another cousin of defendant, testified at trial. He did not want to be there but had received a subpoena. J. identified defendant in court and testified that he had known defendant his whole life. J. knew that his cousin A. had been cut on the arm, but J. denied seeing A. bleeding from a cut outside his house. At trial J. testified that when he

left his house to retrieve A.'s car, he did not see A. sitting in a chair on the driveway in front of his house or an ambulance and the medics, who were treating A.'s cut. J. did not recall testifying at the preliminary hearing that he saw an ambulance when he left his house and that while medics were tending to A., A. asked J. to get his car.

J. acknowledged at trial, however, that the night A. was cut, he picked up A.'s car from Mosswood Drive. J. said that he heard people saying that A.'s car might be towed, and somebody needed to pick it up. J. walked to A.'s car. A police officer asked for J.'s ID and gave him the keys to the car. At trial J. claimed that when he spoke with the officer, he had not known that A. had been cut. J. claimed that he had not seen defendant and his girlfriend fighting at the party, and J. could not recall telling an officer that he had seen defendant drinking, "acting unruly," and arguing with his girlfriend at the party. J. claimed not to remember telling the defense investigator a number of facts.

J. had previously testified at the preliminary hearing as follows. Defendant left the party with his girlfriend. When J. saw an ambulance outside the house, he went outside. He saw medics attending to A., and J. talked to A. A. told J. that his car was parked down the street and asked J. to get it for him.

At some point on September 7, 2014, Officer Asuelo, using gloves, picked up the knife that had been found on Mosswood Drive and handed it to another gloved officer for collection as evidence. He saw a car that was parked diagonally and blocking the street.

While Officer Asuelo was standing next to the car, J. and a woman walked up to the officer. J. began talking about defendant's behavior at the party. The officer took notes. J. said that his cousin had gotten into an argument with his girlfriend and been unruly at the party. J. stated that A. had driven down the block to "where people were fighting," that defendant had a knife in his waistband, and that A. had been stabbed in the process of trying to break up a fight between defendant and his father.

Some officers brought defendant to Officer Asuelo. Defendant was crying and very emotional, sweating, and bleeding. Defendant was sobbing and repeating over and

over that it was an accident. He was extremely intoxicated. Defendant had difficulty standing up and his speech was slurred, and Officer Asuelo smelled alcohol. The officer saw him throw up. Officer Asuelo transported defendant in his patrol car to the regional medical center for treatment.

A physician's assistant (PA) in the "ER" at the San Jose Regional Medical Center testified regarding the medical records for A. from September 7, 2014. The records reflected that A. presented with a stab wound to his left arm, that A. admitted to having a couple of beers that night, and that A. said that he was breaking up a fight when an unknown assailant stabbed him. The PA testified that she had written down A.'s statements as he said them. The records indicated that A. had a five-centimeter laceration, which required "running" stitches on the subcutaneous layer and 10 suture/staples on the top, cutaneous layer of skin.

The PA also treated defendant on the night of September 7, 2014. She repaired a one-centimeter laceration located in his "[o]ral mucosa" or mouth with four stitches.

A forensic DNA analyst with the Santa Clara County District Attorney's Office performed a DNA analysis on reference samples collected from A. and defendant. DNA profiles were generated for A. and defendant. A DNA analysis was also done on the knife.

The analyst took a sample of the "red/brown staining" on the knife's blade near its handle or hilt. He determined that A. was the source of the DNA obtained from the knife blade. The analyst also performed a DNA analysis of the cells obtained by swabbing the knife's handle. He concluded that A. was a possible contributor to the minor component of the DNA mixture found on the knife handle and that defendant was a possible contributor to its major component. But the analyst also indicated that there were at least four individuals, and maybe five or six individuals, represented in the DNA mixture retrieved from the knife handle.

Defense Case

On September 16, 2014, Nancy Adams, a defense investigator for the Santa Clara County Public Defender's Office, interviewed J. and A. about the incident. J. had told her over the phone that on September 7, 2014, he saw his uncle and A. leave the family party. When J. walked outside the house, he saw A., who was one or two houses away, walking back toward the house. A. said he needed to go to the hospital, and there was blood everywhere. J. saw a big gash on A.'s arm. An ambulance came. A. said his car was parked down the street. J. went to get A.'s car so it would not be towed. J. told the investigator that he had not witnessed the incident but an officer had told him that defendant had stabbed A. Neither A. nor J. had told the defense investigator that defendant had been unruly at the party.

Investigator Adams learned from A. that A.'s uncle had asked A. to take him down the street in A.'s car. A. drove his uncle down the street, and they got out of the car. Defendant, who was there, started arguing with his father. A. realized that he had been stabbed when his arm felt wet. A. indicated that he had not been fighting with defendant, that he had not seen defendant with a knife, and that he had not seen defendant throw anything. A. was in shock, and although he could not recall doing so, he apparently had walked back to his cousin's house.

Defendant testified in his own behalf. Defendant was 33 years old at the time of trial, and he had grown up in group homes. He acknowledged his prior convictions.

Defendant could not remember everything that happened on September 7, 2014, because he had been drinking a lot, beginning approximately "a little after 1:30" p.m. He admitted that he was an alcoholic. Defendant put together what had happened by "[b]its and pieces." He had read the police reports and spoken to his girlfriend.

While watching the 49ers game at home on September 7, 2014, defendant drank a few 40-ounce beers. He twice walked down to a liquor store, which was "five houses down," to buy beer.

Defendant testified that when the 49ers game ended, defendant left his house with his girlfriend, intending to go grocery shopping. He admitted that he was carrying a knife in a sheath attached to his belt loop. He explained that he wore the knife for protection since "some neighborhoods [were not] exactly . . . friendly to [him]" because of his "[g]ang affiliation [and] tattoos."

According to defendant, while they were walking to his girlfriend's car to go to the grocery store, his father called and invited them to stop by. Defendant testified that he did not remove his knife because they were going to "make a quick little pit stop" at his father's house "on the way to the grocery store." His girlfriend drove them to his father's house.

Sometime before 7:00 p.m., defendant and his girlfriend arrived at his father's house. His extended family had been watching a 49ers game, and a lot of people were drunk, including his father.

The house's garage was set up as a game room with a pool table and a TV. Defendant drank with his father. Defendant testified that he drank "[a] few 30 packs of Bud Light" and that he was "definitely drinking more" than his father. When questioned further about how many 30 packs he had been drinking, defendant said he had "lost count" and confirmed he had drunk a lot.

When the beer ran out, his girlfriend and he drove to a liquor store about two blocks away and bought more beer and single shots of liquor. When they returned to his father's house, defendant threw up in the bathroom. He texted his girlfriend about leaving and walked out of the house. His girlfriend started laughing, and others laughed too, when he went in the wrong direction to find her car. Defendant was mad because he did not like being laughed at.

According to defendant, after he and his girlfriend got into the car and she pulled out, they began arguing. Defendant was calling her names and yelling at her. She was yelling, too. At trial, he agreed that it was "fair to say" that he had been "out of control."

Defendant's girlfriend turned right from Gomes onto Mosswood, and as the car slowed, defendant jumped out to "get away from the situation" and began walking toward his father's house. As he was walking on the sidewalk, defendant saw his father.

Defendant's father came up to him. His father "kind of threw his hands up" as if to say, "[W]hat the fuck[,] what's going on[?]" Defendant assumed that his girlfriend had called his father, and defendant was angry that his father had come to help her. Defendant was upset that his father was "coming at [him] kind of crazy without hearing [his] side of the story."

Defendant was yelling at his father. There was a lot of yelling and some pushing. Their exchange became heated. They "got in a big pushing match." Defendant pushed his father with both hands, causing his father to fall. Defendant's father got up.

Defendant testified that he knew that his father and he were going to fight. He did not want to roll on the knife and hurt himself. Defendant claimed that to get the knife out of the way, he quickly grabbed the knife's handle, pulled it out of its sheath, and threw it behind him. According to defendant, he was standing in the middle of the Mosswood Drive with his back to Gomes when he threw the knife without aiming. He testified that he did not hear A. yell when he threw the knife. Defendant claimed that at that some point after the September 7, 2014 incident he began to remember that he had thrown the knife.

Defendant testified that his father and he began pushing each other again. Defendant and his father had moved to "a little patch in between the sidewalk and the actual curb" on the east side of Mosswood Drive. Defendant pushed his father again, and his father fell off the curb.

Once his father was down, defendant started walking to the corner of Mosswood and Gomes. Defendant's father got up, and defendant and his father continued yelling "hurtful things" at each other from a distance.

Defendant turned right on Gomes and began walking up Gomes toward Morrill. Defendant saw a number of family members who had been at his father's house come running toward him. Defendant claimed that he thought they were "pissed" because he had "got[ten] into it" with his father. They were yelling, "[Y]ou stabbed [A.]," and "Why did you stab him." Because of the accusations, defendant assumed that he must have been the one who cut A. Defendant said that he did not mean to stab him. At trial, defendant testified that the accusations did not make sense to him because he did not recall stabbing anybody. He later heard from others that he had said on the night of the incident, "[I]t was an accident, I was only throwing it." At trial defendant was asked why he had said, "[I]t was an accident, it was an accident, I was only throwing the knife," in response to his family members' accusations of stabbing. Defendant explained that "the only thing that [had] made sense" to him was that the "stabbing" happened when he threw the knife because that was the only time that the knife had come out.

At that point, defendant's father punched him in the mouth. Defendant indicated that once he knew that he was "fighting somebody," the jersey that he was wearing "came off."

At trial, defendant claimed that he had not seen A. during the incident with his father.

Defendant admitted that the knife and sheath brought into court at trial belonged to him and that an officer had taken the sheath off his belt loop on the night of September 7, 2014. Defendant acknowledged that he had spoken to his girlfriend from jail. He admitted that he asked his girlfriend to speak to or call his cousins A. and J.

Defendant confirmed that he committed a felony assault on both April 12, 2008 and February 26, 2000, he burglarized a commercial establishment on April 15, 2008, and he stole a car on March 27, 2008.

Prosecutor's Rebuttal

The parties stipulated that the jail calls or visits recorded by the Santa Clara County Department of Corrections reflected conversations between defendant and his girlfriend. Portions of the audio recordings were played for the jury.

During a conversation on September 11, 2014, defendant said, "But I need him to come to court, he can't just not come. I need him to come, I need witnesses to come and say it wasn't him." Defendant told his girlfriend, "[A]ll I'm able to piece together is bits and pieces." At one point defendant told his girlfriend, "In a perfect world, what I'm hoping, they go to court, say it wasn't me, they need to say it wasn't me; they can't say it was an accident. . . . [W]hen they say do you . . . know who did it? Yes. Is he in this room? No, they need to say no. . . . So if they do that, . . . the judge'll be like, well drop the case, drop the charges." His girlfriend said, "Okay, I'm going to talk to him. . . . [S]o he has to say it wasn't you." Defendant replied, "He has to say it wasn't me. . . . [T]hey're gonna try to scare him." His girlfriend suggested, "Tell 'em I was drunk, I don't know what I was talkin' about." Defendant said, "[H]e has to. . . , he need to. If he wants to help me out, and—" Defendant indicated that if he did not do that, the "best thing" they could do was to get a lawyer who contended that defendant "didn't stab him" and "the knife was thrown" without "the intent to harm" in order to get it out of the way. His girlfriend said that she would talk to him and offer him money if he did not want to say that. Defendant said, "[I]t shouldn't have to come to that, he's family. But let him know, like, hey, your cousin needs you right now. He was drunk, don't make him pay for somethin' that he did when he was drunk; you guys have all made mistakes when you're drinking."

On September 12, 2014, defendant's girlfriend told defendant that she was going to call A. that day and plead with him. Defendant said, "Yeah." She indicated that she was going to say to A. to "just please do him this favor and give him a chance . . ." Defendant said, "Yeah."

On September 13, 2014, defendant confirmed with his girlfriend that she still had his phone, explained how to find his cousin J.'s number on the phone, and told his girlfriend to call his cousin J. and ask for his help. Defendant indicated that his cousin J. was "supposed to be a homie from [his] hood," and said, "I mean, can you help a homie out or what?" Defendant later said that A. "need[ed] to cooperate," that A. could not just say, "I don't know nothing," and that A. had to tell them that "he tried to throw it" and "I got in the way" or that "that's not him."

On September 17, 2014, defendant asked his girlfriend whether she had tried to get hold of A. and whether she had talked to A. yet. When she indicated that A. was not answering her calls, defendant told her to text A. or give him a message through another named individual and say, "[H]ey, dispensa, my bad."

On September 18, 2014, defendant told his girlfriend, "I don't need 'em to say they don't know what happened." I need him to say "it was an accident . . . I tried to grab it from him . . . and it cut me or he threw it."

Defense Surrebuttal

Defendant testified that he was not trying to suppress the truth when he said to his girlfriend that he needed them not to come to court. He thought if they did not come in that "everything" would be "dropped."

When asked why he said in the first conversation in jail on September 11, 2014 that "they" could not say it was accident, he replied, "I forget. I was already in jail. It wasn't going to matter." Defendant acknowledged much of what he had said on September 11, 2014. Defendant admitted that when his girlfriend indicated that she was going to talk to "him," defendant said, "He has to say it wasn't me." At trial, defendant tried to explain that at that time he believed he had not stabbed his cousin.

As to the recorded call made on September 12, 2014, defendant indicated that he was not talking about fabricating evidence.

Defendant admitted that he had asked his girlfriend to talk to J. for him. Defendant denied that during the recorded call made on September 13, 2014, he was asking his girlfriend to tell J. to lie for him. Defendant indicated that when he said that A. needed to "cooperate" and to say that "he tried to throw it" in that same conversation, defendant meant that he wanted A. to come to court and say what happened, which was that he tried to throw the knife. Defendant denied that when he said, "I got in the way," he was talking about what A. needed to say.

Defendant denied that when he told his girlfriend in a recorded call on September 17, 2014 to tell A. "sorry" that he was attempting to fabricate evidence. At trial defendant did not deny that at one point in a recorded call on September 18, 2014, he said: "I don't need him to say I don't know what happened. I need him to say . . . it was an accident, . . . I tried to grab it from him [and] it cut me or he threw it." Defendant denied that he was trying to come up with "a new lie" when he was talking to his girlfriend.

Defendant admitted to unintentionally cutting A., but he denied intentionally cutting A.

II

Discussion

A. *Admission of Hearsay Statements in 911 Call*

1. *Background*

In a motion in limine, the People moved to admit the statements made to the 911 operator on September 7, 2014 under the hearsay exception for spontaneous statements.

At the beginning of the recorded 911 call, the female caller said, "Oh my God, can we get an ambulance out here? My cousin just got stabbed in his arm, and he's bleeding a lot." A female in the background said, "Apply pressure, big-time," and then, "Tell 'em to hurry up, please." A moment later a female in the background said, "I'm putting as much pressure as I can on it, okay?" In response to questions from a dispatcher, the

female caller indicated that the suspect was a male Mexican. The dispatcher asked, "About how old?" The female caller asked, "How old are you, [A.]?" The female in the background said, "Yeah, he's bleeding a lot." The caller said, "He's bleeding," and, "He's dripping." After the dispatcher reassured the female caller that none of his questions were slowing the emergency response, she apologized and said, "I'm just nervous, this is scary." The female in the background said, "He's bleeding a lot, tell 'em to—." The female caller said, "Mom, wrap him more." The dispatcher asked, "And he was stabbed in the arm?" The caller responded, "Yes, in the arm, and it's just dripping like crazy."

A. then got on the phone and told the dispatcher that he was cut and leaking blood out of his arm. A female in the background said, "There's blood running down everywhere." A few moments later A. said, "[I]t happened like a little bit down the street . . . he took off, and right now my arm is really leaking; I've been cut really bad." A. told the dispatcher, "All I know . . . is that you all need to hurry because my arm is like really cut . . . ." When a second dispatcher asked A. to say "exactly what happened," A. stated that "somebody was getting outta hand, and . . . I drove by and . . . they started like flippin' out. I tried to help out, and they cut me, and I just tried to come back to the house where I was at so they can help me out."

Defense counsel objected to the admission of the statements by unknown females. In ruling on the in limine motion, the trial court found that each of the challenged statements qualified as an excited utterance and was not inadmissible, impliedly under the hearsay rule. The court found that none of those statements should be excluded as unduly prejudicial under Evidence Code section 352. The court ruled that the recorded 911 call was admissible and could be played for the jury.

At trial, defense counsel renewed the objections to "the very beginning portion of the 911 call. Defense counsel argued that "the unidentified female voices that we hear at the beginning of the 911 call [were not] percipient witness to anything." Defense counsel

renewed the Evidence Code section 352 objection to the female caller's statement that her cousin "just got stabbed in the arm and he's bleeding a lot." Defense counsel stated that "the crux of this case" was whether the victim was stabbed or accidentally cut.

The trial court observed: "Stabbing can be done accidentally. Cutting can be done deliberately." Defense counsel argued that the defense in the case was that A. was not stabbed and that it was "problematic" that "an unidentified declarant who is not a percipient witness [to infliction of the injury] [said] 'my cousin just got stabbed.' "[2] The prosecutor argued that the female caller was perceiving the wound on her cousin's arm.

2. *Analysis*

Defendant argues that the trial court erred by admitting hearsay statements because (1) there was no showing of personal knowledge and (2) the evidence was more prejudicial than probative and should have been excluded under Evidence Code section 352.

Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event *perceived by* the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." (Italics added.) As the Supreme Court has observed, "The Evidence Code does not use the term 'witnessed by.' Rather, it refers to an act, condition, or event 'perceived by' the declarant. (Evid. Code, § 1240, subd. (a).)" (*People v. Blacksher* (2011) 52 Cal.4th 769, 810 (*Blacksher*).) "[S]pontaneous statements may include the ' " 'sincere expression' " ' of the speaker's ' " 'actual impressions and belief.' " ' [Citation.]" (*Ibid.*) "[A] hearsay statement, even if otherwise spontaneous, is admissible

[2] Evidence Code section 1240 does not require that the hearsay declarant be identified to satisfy the hearsay exception. (See *People v. Anthony O.* (1992) 5 Cal.App.4th 428, 436; see also *People v. Gutierrez* (2000) 78 Cal.App.4th 170, 178.)

only if it relates to an event the declarant perceived personally." (*People v. Phillips* (2000) 22 Cal.4th 226, 235 (*Phillips*).)

In *Blacksher*, the hearsay declarant, who made statements to a responding police officer after shootings, had not witnessed the shootings but had perceived events from which she could infer that the defendant had fatally shot her daughter and grandson. (*Blacksher, supra,* 52 Cal.4th at pp. 810-811.) The Supreme Court concluded that in that situation "the issue of whether [the declarant] actually saw [the] defendant fire the shots went to the weight of her statements, not their admissibility. [Citation.]" (*Id*. at p. 811.)

Whether a declarant is "relating events [that the declarant] saw . . . or repeating what [the declarant] had heard from some other source" is "a factual question." (*Phillips, supra,* 22 Cal.4th at pp. 235-236.) A reviewing court "will uphold the trial court's determination [of this factual question] if it is supported by substantial evidence. [Citation.]" (*Id*. at p. 236.) Courts "review for abuse of discretion the ultimate decision whether to admit the evidence. [Citations.]" (*Ibid*.)

In this case, the trial court could reasonably conclude that the recorded 911 call reflected that A. was with the unknown females when they made the challenged statements and that each of them was describing A.'s condition and injury as perceived "under the stress of excitement caused by such perception." (Evid. Code, § 1240.) The evidence was sufficient to support findings that the female caller perceived A.'s injury as a stab wound that was bleeding profusely and that her statements that A. had been stabbed in the arm were made under the stress of excitement caused by those perceptions. The trial court acted within its sound discretion in ruling their statements admissible.

B. *Victim's Statements to Defense Investigator*

The defense counsel sought to impeach A. with the statement he made to the defense investigator. The court disallowed defense counsel from confronting A. with two comments contained in his statement. Defendant now asserts that the trial court erred by

excluding evidence that A. stated to the investigator that (1) defendant's actions were not intentional and (2) A. did not care whether defendant was punished.

1. *First Comment*

A.'s statement to the defense investigator included the comment that "[h]e doesn't think it was intentional but [that] he doesn't understand why a weapon came out in the first place." The prosecutor objected to admission of that comment for impeachment, pointing out that A. also said in his statement to the defense investigator that he did not see defendant with a knife and that he did not see defendant throw anything. Defense counsel argued that A. "was there, he knows he got cut, he saw what was happening, at least he tells my investigator that he did" and that A. did not believe it was "an intentional act."

The trial court stated: "I don't think the witness . . . can be impeached with things that he would not have been permitted to testify to initially. . . . I will not permit him to be impeached with his opinion that it was or was not intentional because I think that's clearly the province of the jury and there is certainly no showing that this particular victim has any facts upon which to base that."

Defendant now maintains that "[t]he proffered impeachment statement that [A.] 'doesn't think it was intentional' went directly to the central issue in the case, whether [he] accidently cut [A.] or intentionally stabbed him."

Evidence Code section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770."[3] If the

[3] As indicated, A. claimed at trial that his memory was blank and he did not know how the cut happened. "Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. [Citation.] . . . When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior statements is proper. [Citation.]" (*People v.*

requirements of this section are satisfied, a prior inconsistent statement is not rendered inadmissible by the hearsay rule. However, that is not the same as saying that the evidence is relevant to a substantive issue other than credibility. (See Evid. Code, §§ 210, 350.)

Defendant now argues that A.'s statement that he did not "think it was intentional" was "circumstantial evidence of [defendant's] state of mind" and should have been admitted. Defendant asserts that since "[A.] was a percipient witness, he was competent to testify [based on] his personal observation that [defendant's] behavior was consistent with an intentional [*sic*] act." He cites *People v. Weaver* (2012) 53 Cal.4th 1056 (*Weaver*) and *People v. Chatman* (2006) 38 Cal.4th 344 (*Chatman*) in support of this argument.

In *Chatman*, the defendant was convicted by a jury of "first degree murder under the special circumstance of torture murder and with use of a knife" and grand theft. (*Chatman, supra,* 38 Cal.4th at p. 353, fn. omitted.) The Supreme Court rejected the argument that the trial court erred in overruling the defense counsel's objection to penalty-phase evidence regarding the defendant's assault on a custodian on grounds that it was speculative, irrelevant, and inadmissible under Evidence Code section 352. (*Chatman, supra,* at p. 397.) The court explained: "The witness testified that defendant *seemed* to enjoy kicking the custodian. Because the witness was a percipient witness, he spoke from personal observation. He was competent to testify that defendant's behavior and demeanor were consistent with enjoyment. A history of enjoyment in the infliction of pain is relevant at the penalty phase." (*Ibid*.) The court also pointed out that there was no basis for an objection on the ground of improper opinion because although the general

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Johnson (1992) 3 Cal.4th 1183, 1219-1220.) "[U]nder Evidence Code sections 1235 and 770, a hearsay statement of a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement. (*People v. Johnson*, *supra*, 3 Cal.4th at p. 1219.)" (*People v. Cowan* (2010) 50 Cal.4th 401, 502.)

rule was that "a lay witness may not give an opinion about another's state of mind" (*ibid*.), "a witness may testify about objective behavior and describe behavior as being consistent with a state of mind." (*Ibid*.)

In *Weaver*, following a court trial, the defendant was found guilty of robbery, burglary, and first degree murder under the special circumstances of robbery and burglary murder (§ 190.2 subd. (a)(17)) and sentenced to death. (*Weaver*, *supra*, 53 Cal.4th at p. 1060.) A victim testified over the defendant's objection that he displayed hatred toward the murder victim and " 'was more hostile' toward the murder victim than the other robbery victims." (*Id*. at p. 1086.) "In summarizing the penalty phase evidence, the trial court noted [the victim's] testimony that [the] defendant showed hatred and anger toward the murder victim." (*Ibid*.) The Supreme Court rejected the argument that the victim's testimony constituted "an improper opinion based on speculation" (*ibid*.), explaining that the victim "was a percipient witness to the crime [and therefore] competent to testify that defendant displayed hatred before shooting the victim." (*Ibid*.) It relied on *Chatman*. (*Ibid*.)

The trial court in this case implicitly recognized that even if the hearsay exception established by Evidence Code section 1235 applied, it did not necessarily make A.'s comment as to whether "it was intentional" relevant for nonimpeachment purposes. The court's reasoning for its ruling also suggested that the defense had not made an adequate foundational showing of A.'s personal knowledge. Under *Chatman* and *Weaver*, a witness may testify about a defendant's behavior that the witness had *observed* and describe that behavior as being consistent with a state of mind.

"The determination regarding the sufficiency of the foundational evidence is a matter left to the court's discretion. [Citation.] Such determinations will not be disturbed on appeal unless an abuse of discretion is shown. [Citations.]" (*People v. Brooks* (2017) 3 Cal.5th 1, 47.) Defendant has not shown that the trial court abused its discretion by impliedly determining that there was an insufficient showing that A.'s comment as to

whether "it was intentional" was based on A.'s personal knowledge. (See Evid. Code, §§ 403, subd. (a)(2) ["The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony"]), § 702 [personal knowledge requirement].)

A. disclosed to the investigator that defendant and his father were arguing and then he felt his arm was wet and realized he had been stabbed. But A. expressly told the defense investigator that he had not seen defendant with a knife. Under these circumstances, the trial court did not abuse its discretion in finding that defendant had failed to make an adequate showing that A. was actually describing defendant's behavior with the knife, which A. had *observed*, when A. said that he did not think "it was intentional."

Further, in *Weaver* and *Chatman*, the defendant's state of mind was relevant to a disputed fact. Insofar as A.'s comment referred to defendant's specific intent to injure him, that intent was irrelevant to the charge of assault with a deadly weapon.

"Assault is a general intent crime; it does not require a specific intent to cause injury. [Citations.] The requisite mental state is 'actual knowledge of the facts sufficient to establish that the defendant's act by its nature will probably and directly result in injury to another.' [Citations.]" (*In re B.M.* (2018) 6 Cal.5th 528, 533-534 (*B.M.*).) "[A]ssault does not require . . . a subjective awareness of the risk that an injury might occur." (*People v. Williams* (2001) 26 Cal.4th 779, 790.) "Although the defendant must intentionally engage in conduct that will likely produce injurious consequences, the prosecution need not prove a specific intent to inflict a particular harm. (Cf. Pen.Code, § 7, subd. 1 [' "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to'].)" (*People v. Colantuono* (1994) 7 Cal.4th 206, 214.)

Further, a claim of accident is "a claim that the defendant acted without forming the *mental state necessary* to make his or her actions a crime. [Citations.]"[4] (*People v. Lara* (1996) 44 Cal.App.4th 102, 110, italics added; see CALCRIM No. 3404.) Defendant has not argued that he made an adequate showing that A. had observed defendant's behavior with the knife and described it as consistent with a lack of " 'actual knowledge of the facts sufficient to establish that [his] act by its nature will probably and directly result in injury to another.' [Citations.]" (*B.M., supra*, 6 Cal.5th at p. 534.) A. told the investigator that he had not seen defendant with a knife and that he did not remember defendant throwing anything.

Defendant has failed to establish that the trial court abused its discretion in excluding A.'s comment on the grounds raised on appeal.[5]

2. *Second Comment*

Defendant contends that A.'s statement that he did not care whether defendant got a lot of time was relevant to the nonexistence of bias in favor of defendant and that the trial court abused its discretion in excluding the statement under Evidence Code section 352. The trial court found that there was a "danger of contaminating the jury or confusing [the jurors] with issues of time and punishment" and that it was "really hard to sanitize" the comment.

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[4] "Penal Code section 26 states the statutory defense: 'All persons are capable of committing crimes except those belonging to the following classes: [¶] . . . [¶] Five—Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.' The defense appears in CALCRIM No. 3404, which explains [that] a defendant is not guilty of a charged crime if he or she acted 'without the intent required for that crime, but acted instead accidentally.' " (*People v. Anderson* (2011) 51 Cal.4th 989, 996.)

[5] We note that A. also told the defense investigator that he was "trying to protect his cousin" and he did not "want his cousin to get in trouble." At trial defendant testified that he deliberately removed the knife from its sheath on his belt and threw it. It is not "reasonably probable that a result more favorable to the appealing party would have been reached" had A.'s comment that he did not think "it was intentional" been admitted. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Applying this standard, we find no abuse of discretion. In addition, any assumed statutory error would be harmless. (See *ante*, fn. 5.)

C. *Constitutional Rights to Confront Adverse Witnesses and to Present a Defense*

Defendant argues that the trial court's exclusion of part of A.'s statement to the defense investigator offered for impeachment violated defendant's federal constitutional rights to confront adverse witnesses and to present a defense. Defendant concedes, as he must, that any objections to the exclusion of those two comments on confrontation clause grounds were forfeited. "The right to confrontation may, of course, be waived, including by failure to object to the offending evidence." (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 314, fn. 3.) In addition, as defendant acknowledges, his claim that the exclusion of those comments violated his due process right to present a defense was preserved only insofar as the trial court's rulings constituted error on the grounds raised and had the additional legal consequence of violating due process.

"If the court overrules [an evidentiary] objection, the objecting party may argue on appeal that the evidence should have been excluded for the reason asserted at trial, but it may not argue on appeal that the court should have excluded the evidence for a reason different from the one stated at trial. A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct." (*People v. Partida* (2005) 37 Cal.4th 428, 435.) But the objecting party "may make a very narrow due process argument on

appeal," which is that "the asserted error in admitting the evidence over his . . . objection had the additional legal consequence of violating due process." (*Ibid*.) "[R]ejection, on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional 'gloss' as well. No separate constitutional discussion is required in such cases." (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.) Here, the trial court did not err in excluding evidence of A.'s two comments. Therefore, no further constitutional analysis is required.

D. *Alleged Ineffective Assistance of Counsel*

Defendant further asserts that defense counsel acted deficiently by failing to "argue that exclusion of [two of A.'s comments to the defense investigator] violated [his] federal constitutional right[s] to confront the witnesses against him and to present a defense." As we explain, defendant has not established his claims of ineffective assistance of counsel.

1. *Governing Law*

The standard for evaluating a claim of ineffective assistance of counsel is well established. It requires a two-prong showing of deficient performance and resulting prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." (*Id*. at p. 700.)

As to deficient performance, a defendant "must show that counsel's representation fell below an objective standard of reasonableness" measured against "prevailing professional norms." (*Strickland, supra*, 466 U.S. at p. 688.) "Judicial scrutiny of counsel's performance must be highly deferential." (*Id*. at p. 689.) "[E]very effort" must "be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (*Ibid*.) "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Ibid*.)

The prejudice prong requires a defendant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland, supra*, 466 U.S. at p. 694.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Ibid*.)

"In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel [had] acted differently. [Citations.] Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different. [Citation.] This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.' [Citation.] The likelihood of a different result must be substantial, not just conceivable. [Citation.]" (*Harrington v. Richter* (2011) 562 U.S. 86, 111-112 (*Harrington*).)

2. *Failure to Object Based on Defendant's Right to Confrontation*

" '[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.' [Citation.] It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things . . . prejudice, confusion of the issues, . . . or interrogation that is . . . only marginally relevant. . . . '[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' [Citation.]" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678-679; see *Chatman, supra*, 38 Cal.4th at p. 372.)

" '[U]nless the defendant can show that the prohibited cross-examination would have produced "a significantly different impression of [a witness's] credibility" [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment.' [Citation.]" (*Chatman, supra*, 38 Cal.4th at p. 372.) In other words, to prevail on a confrontation claim, defendant must demonstrate that the "cross-examination would have produced 'a significantly different impression of [a witness's] credibility.' " (*People v. Frye* (1998) 18 Cal.4th 894, 946, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22.)

Defendant has not demonstrated that there is a reasonable probability that the result of the proceeding would have been different if his defense counsel had interposed confrontation clause objections to the court rulings prohibiting counsel from impeaching A. with the two comments he made to the defense investigator. (*Strickland, supra*, 466 U.S. at p. 694.)

3. *Failure to Object Based on Due Process*

" 'As a general matter, the "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." [Citations.] Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.]" (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428.) Thus, even assuming arguendo that the trial court erred, " 'there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense.' [Citation.]" (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103.)

In addition, "[a] defendant's rights to due process and to present a defense do not include a right to present to the jury a speculative, factually unfounded inference. [Citation.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 442.) Also, the exclusion of irrelevant evidence does not deprive a defendant of his right to present a defense.

(See *People v. Thornton* (2007) 41 Cal.4th 391, 445.) Lastly, in the guilt phase, "[a] defendant's possible punishment is not a proper matter for jury consideration. [Citation.]" (*People v. Holt* (1984) 37 Cal.3d 436, 458.)

In this case, Officer Levos testified at trial that he heard and wrote in his report that defendant had said to his father that he did not "mean to stab" his cousin and that he was "only throwing the knife." At trial, the defense investigator confirmed that A. had said that he was stabbed. She testified that A. had indicated that when he spoke to police on the night of the stabbing, he was "trying to protect his cousin" and did not "want his cousin to get in trouble." At trial A. acknowledged that he loved defendant.

In light of the law and the evidence as a whole, defendant has not demonstrated that there is a reasonable probability that the result of the proceeding would have been different if defense counsel had objected to the exclusion of the evidence of A.'s two comments to the defense investigator on the ground of due process. (*Strickland*, *supra*, 466 U.S. at p. 694.)

E. *Cumulative Effect of Alleged Errors*

Defendant asserts that the trial court's alleged errors of admitting the 911 call statements indicating that A. had been stabbed and excluding A.'s two comments to the defense investigator "cumulatively denied [him] a fair trial." We have found no errors or cumulative prejudice denying defendant a fundamentally fair trial. This is not a case where "a series of trial errors, though independently harmless, . . . [rose] by accretion to the level of reversible and prejudicial error. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 844-845.)

F. *New Discretion to Strike Enhancement for Prior Serious Felony Conviction*

Defendant argues that the retroactivity rule of *In re Estrada* (1965) 63 Cal.2d 740 applies and that this court should remand the matter to allow the trial court to exercise its discretion as to whether to dismiss or strike the prior serious felony enhancement, as now permitted under section 1385. The People contend that defendant's argument is "not ripe

because the statutory amendment authorizing such action will not become effective until January 1, 2019." This contention is no longer valid because the legislation is now in effect.

Effective January 1, 2019 (see Stats. 2018, ch. 1013, § 2, p. 6672 [Sen. Bill No. 1393]; Gov. Code, § 9600, subd. (a)), section 1385 was amended to delete the provision prohibiting a judge from striking a prior serious felony conviction enhancement. Section 667, subdivision (a), also was amended to omit its reference to section 1385, subdivision (b). (See Stats. 2018, ch. 1013, § 1, pp. 6668-6669 [Sen. Bill No. 1393].) Section 1385 now permits a court "in furtherance of justice" to exercise its discretion to strike or dismiss a five-year enhancement for a prior serious felony conviction.

The People do not dispute that after January 1, 2019, the new law applies to nonfinal judgments under the *Estrada* rule. "[N]ewly enacted legislation mitigating criminal punishment reflects a determination that the 'former penalty was too severe' and that the ameliorative changes are intended to 'apply to every case to which it constitutionally could apply,' which would include those 'acts committed before its passage[,] provided the judgment convicting the defendant of the act is not final.' (*Estrada, supra*, 63 Cal.2d at p. 745.) The *Estrada* rule rests on the presumption that, in the absence of a savings clause providing only prospective relief or other clear intention concerning any retroactive effect, 'a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.' [Citation.] 'The rule in *Estrada* has been applied to statutes governing penalty enhancements, as well as to statutes governing substantive offenses.' [Citations.]" (*People v. Buycks* (2018) 5 Cal.5th 857, 881-882.)

The People's alternative argument is that "the trial court's statements at sentencing clearly indicate that it would not have dismissed the prior [serious felony] conviction

even if it had the power to do so" and therefore a remand is "unwarranted." They assert that the same reasons underlying the court's *Romero* determination "establishes that there exists no reasonable probability the court would dismiss the prior serious felony conviction." We cannot agree that the record reflects that the court would not have exercised its discretion under section 1385, if it had had such discretion, to strike or dismiss the five-year enhancement for defendant's prior serious felony conviction.

Although the trial court denied defendant's *Romero* motion, its analysis was properly aimed at determining only whether defendant fell outside the spirit of the Three Strikes law. In deciding "whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to . . . section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) Based on such analysis, the trial court imposed an indeterminate term of 25 years to life on the conviction of assault with a deadly weapon under the Three Strikes law.

But contrary to the People's assertion, the trial court's comments in ruling on defendant's *Romero* motion suggest that it might well have been willing to strike the five-year enhancement for his serious felony conviction if it had had the discretion. The court stated: "I think there's even much truth in . . . what the public defender said, that 14 years may well be a just sentence in this case. It's twice what you got the last time for stabbing somebody. The injuries this time were not life threatening . . . . [¶] It wasn't a rival gang member . . . . It wasn't some stranger or other innocent person, it was a family member who, in the course of a disagreement that he wasn't even part of originally, . . .

in the heat of the battle, somehow got stabbed." The court expressly stated, "I wish the law were such that you could get a 14-year sentence, but I can't do that unless I find you're outside of the spirit of the three-strikes law." Although the trial court had no authority at the time of sentencing to strike the five-year enhancement imposed for defendant's prior serious felony conviction, it did strike the punishment for his prior prison term pursuant to section 1385, while stating "I'm sure [it] is not enough."

The trial court must be afforded an opportunity to exercise its discretion under current section 1385 to strike the five-year enhancement imposed under section 667, subdivision (a). (Cf. *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427-428 [matter remanded where section 12022.53 as amended permitted trial court to strike or dismiss a firearm enhancement in the interest of justice pursuant to section 1385 and "record contain[ed] no clear indication of an intent by the trial court not to strike one or more of the firearm enhancements"]; cf. also *People v. Chavez* (2018) 22 Cal.App.5th 663, 713-714 [same].)

DISPOSITION

The judgment is reversed, and the matter is remanded for the limited purpose of resentencing in light of sections 667, subdivision (a), and 1385, subdivision (b), as amended effective January 1, 2019.

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ELIA, J.

WE CONCUR:

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PREMO, Acting P. J.

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BAMATTRE-MANOUKIAN, J.

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